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No. 05-416

In The
Supreme Court of the United States

JEANNE S. WOODFORD, WARDEN, A.P. KANE,

Petitioners,

v.

VIET MIKE NGO,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION OF THE YALE LAW SCHOOL AS AMICUS CURIAE

At the Jerome N. Frank Legal Services Organization of the Yale Law School (LSO), law students supervised by law school clinical faculty provide free representation to indigent people in need of legal aid.[1] Since 1970, LSO students have provided legal assistance to incarcerated people, first through a Prison Clinic, and now through both the Prison Clinic and the Complex Federal Litigation Clinic (CFL). Yale students have represented inmates in federal and state courts and before administrative agencies, in a range of proceedings including habeas and civil rights actions, and involving a wide variety of issues. In recent years, LSO has litigated a number of cases involving Prison Litigation Reform Act (PLRA) exhaustion. This case will determine the viability of at least one current LSO client's case, and it will affect the remedies available to many other inmates seeking help from LSO.

SUMMARY OF THE ARGUMENT

The government urges this Court to engraft a judicially created procedural default rule onto the exhaustion requirement of the Civil Rights of Institutionalized Persons

[1] The parties have consented to the filing of this amicus brief and consent letters have been filed with the Clerk. Sup. Ct. R. 37(3). Pursuant to Supreme Court Rule 37(6), amicus states that no counsel for any party authored any part of this brief. No person or entity other than the Jerome N. Frank Legal Services Organization of the Yale Law School (LSO) made any monetary contribution to the preparation or submission of this brief.

Act (CRIPA), as amended by the PLRA, 42 U.S.C. § 1997e(a). The government's gloss is not required by the statute and is inconsistent with the structure and purpose of 42 U.S.C. § 1983 and the other civil rights statutes. The simple exhaustion requirement that Congress mandated in § 1997e(a) is intended to provide, as this Court has stated, "time and opportunity [for corrections officials] to address complaints internally before allowing the initiation of a federal case." *Porter v. Nussle*, 534 U.S. 516, 524 (2002). Congress did not intend to require federal courts to stand idle in the face of constitutional violations because an inmate missed a grievance deadline. *See Thomas v. Woolum*, 337 F.3d 720, 733 (6th Cir. 2003).

A procedural default rule will severely impair federal courts' ability to remedy constitutional abuses in prisons, because correctional grievance procedures are marked by numerous levels of review and short deadlines, inviting procedural errors by unrepresented inmates. Amicus LSO has surveyed correctional policies nationwide, and the Appendix to this brief includes a chart describing grievance policies promulgated by the United States Bureau of Prisons, state correctional systems, and jails. Many of these policies include numerous levels of review, with deadlines as short as two to five days.[2]

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[2] *See, e.g.*, Indiana Dept. of Correction, Policy No. 00-02-301(XVIII)(A) and (C) (May 1, 2000) (allowing forty-eight hours for informal complaint and an additional two working days for the filing of a formal grievance); Michigan Dept. of Corrections Policy No. 03.02.130(R) and (X) (Dec. 19, 2003) (requiring attempt at informal resolution within two business days, followed by the filing of a grievance within five business days); Rhode Island Code of Reg. 06.070.002 (10) (Jan. 7, 1980) (requiring grievances to be filed within three days).

Grafting a procedural default rule onto the civil rights statutes will exact the greatest toll on the most vulnerable inmates and detainees. Under such a regime, the least sophisticated inmates and those most in danger or most easily intimidated will suffer disproportionately: juveniles, first-time offenders, the mentally ill, victims of sexual assault who do not immediately come forward, the illiterate or marginally literate, those who do not speak English, and those who fear retaliation or further abuse by line staff.

In *Minix v. Pazera*, 2005 WL 1799538 at *1 (N.D. Ind. July 27, 2005), a district court dismissed on summary judgment claims arising from repeated beatings and a sexual assault that a child had suffered in an Indiana juvenile facility. The court based its decision on the child's failure to comply with the Indiana grievance process, which includes a two-business-day filing deadline, despite what the court termed the juvenile's mother's "heroic" attempts to alert state officials to the abuse. *Id.* at *2, 4, 7. Less than two months after the district court issued its decision in *Minix*, the United States Department of Justice (DOJ) Civil Rights Division found that the Indiana juvenile facility at issue in *Minix* had violated children's constitutional rights by failing to protect them from harm, and that its "dysfunctional" grievance system had contributed to the unconstitutional conditions.[3] *Minix* confirms that a procedural default rule will result in dismissal of

[3] Letter of Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana 2, 3, and 7 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (last visited Jan. 24, 2006).

meritorious constitutional claims, and accord undue deference to grievance systems that lie wholly within the control of the defendants.

Both Petitioner and the United States claim that the federal-state comity concerns animating the habeas procedural default rule also apply to PLRA exhaustion, Brief of Petitioner, *Woodford v. Ngo* (No. 05-416) (Pet. Br.) at 28-30; Brief of the United States, *Woodford v. Ngo* (No. 05-416) (U.S. Br.) at 13-15, and the United States argues that rules governing judicial review of federal agencies' decisions should govern civil rights actions, U.S. Br. at 10-12. However, neither federal habeas review of state court criminal convictions nor judicial review of agency decisions presents a true analogy for exhaustion in the context of federal civil rights actions. Civil rights suits are original actions, designed to vindicate federal rights when state and local officials are unable or unwilling to do so. *See Monroe v. Pape*, 365 U.S. 167, 180 (1961), *overruled on other grounds*, *Monell v. Dept. of Soc. Services*, 436 U.S. 658 (1978). The minimal process provided by many inmate grievance systems cannot be compared with state court criminal proceedings, or agency actions under the Administrative Procedure Act (APA), *see* 5 U.S.C. § 556 (2005), *et seq*. *See Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004).

ARGUMENT

Neither the text nor the legislative history of CRIPA as amended by the PLRA requires a procedural default rule. The amicus brief filed by a number of states acknowledges candidly that, "[t]he language of § 1997e(a) does not specifically address the issue." Brief of the State

of New York *et al.* as Amici Curiae at 2, *Woodford v. Ngo* (No. 05-416) (N.Y. Br.). Another amicus brief filed in support of Respondent examines the legislative history of CRIPA as amended by the PLRA, and demonstrates that Congress did not intend to adopt a procedural default rule. Brief of A.C.L.U. National Prison Project as Amicus Curiae, *Woodford v. Ngo* (No. 05-416). This Court has been rightly reluctant to invent exhaustion rules for civil rights litigation without explicit Congressional guidance. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982) ("A judicially imposed exhaustion requirement would be inconsistent with Congress' decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 816 n.19 (1980) ("[W]e do not believe that a court should read in a time limitation provision that Congress has not seen fit to include . . . at least when dealing with a statutory scheme in which laymen, unassisted by trained lawyers[,] initiate the process.") (internal citations and quotation marks omitted).

Recognizing the absence of a Congressional mandate for a procedural default rule, the government relies on policy arguments about the need for timely investigations of inmates' complaints, N.Y. Br. at 3, and analogizes to other areas of the law, such as habeas and administrative law, Pet. Br. at 26-30, U.S. Br. at 10-15. These arguments provide slim justification for a draconian rule that would allow jailers to determine whether federal courts can review constitutional claims, eviscerating the civil rights statutes and depriving the most vulnerable inmates of access to a federal forum.

I. A PROCEDURAL DEFAULT RULE WOULD SIGNIFICANTLY RESTRICT THE ENFORCEMENT OF CIVIL RIGHTS STATUTES IN PRISONS, JAILS, AND JUVENILE FACILITIES.

A. Correctional grievance procedures nation-wide are marked by successive short deadlines.

A procedural default rule would drastically impair federal courts' ability to remedy many types of constitutional violations. Inmate grievance procedures are characterized by numerous levels of review, each with its own deadline. Many of these deadlines are quite short. The government states that "[m]ost jurisdictions require the filing of administrative claims within 14 to 30 days of the action being challenged." U.S. Br. at 29. This is not the whole story. To better understand the nature of inmate grievance procedures, amicus LSO has compiled a collection of state and local jurisdictions' grievance procedures.[4] The chart in the Appendix to this brief summarizes our findings.

More than a dozen of the department of corrections policies summarized in the chart provide for periods shorter than fourteen days for the filing of the first official

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[4] Amicus compiled these policies by searching electronic databases and the internet and by canvassing attorneys and advocates. Because inmate grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they are revised frequently, the policies set out in the chart should be considered illustrative only. Amicus does not represent that they are the most current. The second column of the chart states the source of information on which we relied in preparing the chart, including an effective date (when available). The policies and other materials that we relied on in compiling the chart are available on our web site at http://www.law.yale.edu/Woodford.

grievance – between two and ten days counted in some jurisdictions from the date of the incident and in others from the response to an informal complaint.[5] More than thirty of the departments of corrections that we surveyed require a prisoner to at least attempt informal resolution – talking with a staff member or submitting a request form – before filing a grievance.[6] Some of these policies set

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[5] *See* Arizona Dept. of Corrections Dept. Order 802.09, 1.1.2 (Mar. 3, 2000) (ten days); Arkansas Dept. of Corrections Admin. Dir. 04-01(IV)(E)(7) (Feb. 1, 2004) (three working days); Georgia Dept. of Corrections Standard Operating Procedures (SOP) IIB05-0001(VI)(C)(2) (June 1, 2004) (five business days); Indiana Dept. of Corrections Policy No. 00-02-301 XVIII (C) (May 1, 2000) (two working days); Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2) (Jan. 4, 2005) (five working days); Massachusetts Dept. of Correction, 103 CMR 491.08(4) (Jan. 5, 2001) (ten working days); Michigan Dept. of Corrections Policy 03.02.130 (X) (Dec. 19, 2003) (five business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(I)(3) (Jan. 15, 1992) (five working days); Montana State Prison Policy No. 3.3.3 V (F)(1) (Apr. 1, 1997) (three working days); Nevada Dept. of Corrections Admin. Reg. 740.02, § 1.5.1 (Jan. 5, 2004) (five days); Rhode Island Code of Regulations 06.070.002(E)(10) (Jan. 7, 1980) (three days); South Dakota Dept. of Corrections, Policy No. 1.3.E.2, Formal Resolution (A) (Aug. 3, 2005) (five working days); Tennessee Dept. of Corrections Index No. 501.01 VI (C)(1) (May 1, 2004) (seven calendar days); Utah Dept. of Corrections Institutional Operations Division Manual, FDr02/03.03(C) (July 1, 2003) (five working days).

[6] *See* United States Bureau of Prisons Directive 1330.13, § 542.13 (Aug. 13, 2002); Alaska Dept. of Corrections Policy Index No. 808.03 (B)(1) (May 23, 2002); Arizona Dept. of Corrections Dept. Order 802.01, 1.1.3 (Mar. 3, 2000); Arkansas Admin. Dir. 04-01 (IV)(E)(1) (Feb. 1, 2004); California Dept. of Corrections, tit. 15, Calif. Code of Reg. § 3084.2(b) (2004); Connecticut Dept. of Correction, Admin. Dir. 9.6 (9) (Mar. 5, 2003); Delaware Bureau of Prisons Proc. No. 4.4 at 5 (May 15, 1998); District of Columbia Dept. of Corrections D.O. 4030.1D VII (F)(1) (May 4, 1992); Rules of the Florida Dept. of Corrections, Ch. 33-103.005(1) (Oct. 9, 2005); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 VI(B)(1) (June 1, 2004); Hawaii Dept. of Corrections, Policy No. 493.12.03(4.0)(10)(b) (Apr. 3, 1992); Idaho Dept. of Corrections Dir.

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out deadlines for initiating the informal resolution process that are quite short – as short as two days. *See, e.g.*, Indiana Dept. of Correction, Policy No. 00-02-301 XVIII (A) (May 1, 2000) (forty-eight hours); Michigan Dept. of Corrections Policy No. 03.02.130 (R) (Dec. 19, 2003) (two business days).[7] A number of policies require a prisoner

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No. 316.02.01.001, 05.02.01 (Sept. 16, 2004); Illinois Dept. of Corrections, 20 Ill. Adm. Code § 504.810(a) (2005); Indiana Dept. of Corrections, Policy No. 001-02-301, XIV (May 1, 2000); Iowa Dept. of Corrections, Policy No. IN-V-46 V(A) (Jan. 2005); Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-101(b); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1 VI(B)(1); Michigan Dept. of Corrections Policy No. 03.02.130(x) (Dec. 19, 2003); Minnesota Dept. of Corrections Policy No. 303.100(A)(1)(a)(2) (May 1, 2005); Missouri Dept. of Corrections, Institutional Services Policy and Procedure Manual Procedure No. IS 8-2.1 III(H)(1) (Jan. 15, 1992); Montana State Prison Policy No. 3.3.3 V(E) (Apr. 1, 1997); Nebraska Dept. of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 003.02; Nevada Dept. of Corrections, Admin. Reg. 740, § 1.4.1.1 (Jan. 5, 2004); New Hampshire Dept. of Corrections, Statement No. 1.16 IV (A)(1) (Oct. 1, 2002); New Mexico Corrections Dept., CD-150501(A)(1) (June 22, 2005); North Carolina Dept. of Corrections, Rules and Policies Inmate Booklet, § 20(6)(a) (Mar. 2002); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI(H)(1) (May 5, 2005); Ohio Admin. Code § 5120-9(J)(1)-31; Oklahoma Dept. of Corrections, OP-090124 IV(A) (Oct. 11, 2005); Oregon Admin. Rules 291-109-0140(1)(a); South Carolina Dept. of Corrections Policy No. GA-01.12 (13.1) (Nov. 1, 2004); South Dakota Dept. of Corrections, Policy No. 1.3.E.2, Informal Resolution (Aug. 3, 2005); Texas Dept. of Criminal Justice, Offender Orientation Handbook VI(B) (Nov. 2004); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A) (July 1, 2003); Virginia Dept. of Corrections Procedure No. DOP 866-7.13 (Nov. 20, 1998); Washington Dept. of Corrections, No. DOC 550.100 (Mar. 1, 2005); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A (C)(1)(a) (Dec. 11, 1998).

[7] *See also* Arizona Dept. of Corrections, Dept. Order 802.08 (Mar. 3, 2000) (ten working days); Delaware Bureau of Prisons, Proc. No. 4.4 (May 15, 1998) (seven calendar days); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 (VI)(B)(5) (June 1, 2004) (ten calendar days);

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to attempt informal resolution *within* the time for filing the first official grievance. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9) (Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (F)(1) and (3) (May 4, 1992). Some policies allow prison officials a number of days in which to respond to the informal complaint before the prisoner may go on to file the formal one. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9), (10)(G) (Mar. 5, 2003) (requiring informal resolution and permitting staff fifteen days to respond to informal request, but requiring that formal grievance be filed within thirty days of incident).

All of the department of corrections policies that we reviewed required an inmate to pursue at least one level of review of the initial response to a formal grievance in order to complete administrative exhaustion. Many mandate two or more levels of review. Of the corrections department policies that we collected, a significant number required an administrative appeal in fewer than fourteen days; deadlines were as short as three to five days in many instances.[5] The Alaska and Indiana policies

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Montana State Prison Policy No. MSP 3.3.3 V (E)(1) (Apr. 1, 1997) (five working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 004.01 (three calendar days); New Mexico Corrections Dept., CD-150500 (June 22, 2005) (five calendar days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights VI (H) (May 5, 2005) (five calendar days); Oklahoma Dept. of Corrections, OP-090124 IV(A) and (B) (Oct. 11, 2005) (three days for attempt at verbal resolution, seven days for written attempt at resolution); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03 (July 1, 2003) (seven working days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(C)(1) (Dec. 11, 1998) (seven calendar days).

[5] *See* Alaska Dept. of Corrections, Index No. 808.03 (B)(4) (May 23, 2002) (two working days); Arizona Dept. of Corrections, Dept. Order 802.09, 1.3 (Mar. 3, 2000) (ten calendar days); Arkansas Dept. of

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Corrections, Admin. Dir. 04-01 IV (G) (Feb. 1, 2004) (five working days); Colorado Dept. of Corrections, Reg. No. 850-04 IV (D)(1)(c) (Dec. 15, 2005) (five calendar days); Connecticut Dept. of Correction, Admin. Dir. 9.6(16) (Mar. 5, 2003) (five calendar days); Delaware Bureau of Prisons, Pro. No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998) (three days); District of Columbia Dept. of Corrections, D.O. 4030.1D VII(G)(3) (May 4, 1992) (five days); Georgia Dept. of Corrections, SOP II B05-0001 (VI)(D)(2)(1) (June 1, 2004) (five business days); Hawaii Dept. of Public Safety, Policy No. 493.12.03, 4.15 (a) and (f) (Apr. 3, 1992) (five days); Idaho Dept. of Correction, Dir. No. 316.02.01.001, 05.03.00 (Sept. 16, 2004) (ten days); Indiana Dept. of Correction, Policy No. 00-02-301 XVIII (C) (May 1, 2000) (two business days); Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-102(b) and (c)(1) (three days); Kentucky Dept. of Corrections, Policy No. 14.6 II (J)(2)(j) and (3)(c) (Jan. 4, 2005) (three working days); Louisiana, La. Admin. Code, tit. 22 pt. I, § 325(G)(2)(a) (five days); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1IV(D)(1) and (E)(1) (ten days); Maryland Dept. of Public Safety and Correctional Services (Division of Correction), Directive No. 185-101 III(G)(1) (Apr. 1, 1993) (ten calendar days); Massachusetts Dept. of Correction 103 CMR 491.12(1) (Jan. 5, 2001) (ten working days); Michigan Dept. of Corrections Policy Directive No. 03.02.130 (DD) and (HH) (Dec. 19, 2003) (five business days and ten business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual III(K) (January 15, 1992) (five working days and ten working days); Montana State Prison Policies and Procedures, Policy No. 3.3.3 V(I)(1)(a) (Apr. 1, 1997) (three working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch. 2, § 004.05 (ten days); Nevada Dept. of Corrections, Admin. Reg. 740.02, 1.3.4 (Jan. 5, 2004) (five days); New Jersey Dept. of Corrections IMM.RRP.003 IV(H) (Aug. 1, 2003) (ten working days); New Mexico Corrections Dept., CD-150501(D)(1) (June 22, 2005) (seven days); New York State Dept. of Correctional Services, N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7(b)(1) (2005) (four working days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(3)(a) (May 5, 2005) (five days); Pennsylvania Dept. of Corrections, Policy No. DC-ADM 804 VI(C)(1)(b) (Jan. 3, 2005) (ten working days); Rhode Island Code of Rules 06 070 002 (C)(1), (D)(1), and (E)(2) (Jan. 7, 1980) (three working days); South Carolina Dept. of Corrections Policy No. GA-01.12(13.5) (Nov. 1, 2004) (five calendar days); South Dakota Dept. of Corrections, Policy No. 1.3.E.2, Appeals to the Secretary of Corrections (B) (Aug. 3, 2005) (10 days). Tennessee Dept. of Corrections, Index No. 501.01 VI

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that we reviewed allow only two working days for certain appeals.[9] The Delaware and Kansas policies that we obtained permit three calendar days for appeals.[10] Several departments of corrections permit only three working days for certain appeals.[11] The New York State Department of Correctional Services policy permits only four working days for appeals. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7 (2005). Ten of the policies that we collected (including the policy of the Connecticut Department of Correction) allow five calendar days to appeal.[12] An additional six

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(C)(2) and (3) (May 1, 2004) (five days); Utah Dept. of Corrections, Policy Manual, FDr02/03.031(C) (July 1, 2003) (five working days); Virginia Dept. of Corrections, Pro. No. DOP 866-7.16(5) (Nov. 20, 1998) (five days); West Virginia Division of Corrections, W.Va. Code of State Rules § 90-9-3.1.10, 3.2.1 (five working days); Wisconsin Dept. of Corrections, Wisconsin Admin. Code § DOC 310.13(1) (2005) (ten days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(G)(2) (Dec. 11, 1998) (ten days).

[9] Alaska Dept. of Corrections Index No. 808.03 (B)(4) (May 23, 2002); Indiana Dept. of Correction, Policy No. 00-02-301 XVIII (E), (G), and (I) (May 1, 2000).

[10] Delaware Bureau of Prisons Policy, No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998); Kansas Dept. of Corrections, Art. 15, Policy No. 44-15-102 (c)(1).

[11] Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2)(j) and (3)(c) (Jan. 4, 2005); Maryland Dept. of Public Safety and Correctional Services (Division of Pretrial Detention and Services), Dir. No. 180-1 V (C)(1) (Nov. 30, 2000); Montana State Prison Policy No. 3.3.3 V(I)(1)(a) and (K)(1) (Apr. 1, 1997); Rhode Island Dept. of Corrections, R.I. Code R. 06.070.002 (C)(1), (D)(1), and (E)(2) (Jan. 7, 1980).

[12] *See* Colorado Dept. of Corrections Admin. Reg. 850-04 IV (D)(1)(c) (Dec. 15, 2005); Connecticut Dept. of Correction, Admin. Dir. 9.6 (16) (Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (G)(3) and (4) (Apr. 4, 1992); Hawaii Dept. of Public Safety, Policy No. 493.12.03(15)(a)(F) (Apr. 3, 1992); Louisiana, La. Admin. Code, tit. 22, pt. I, § 325(G)(2)(a); Nevada Dept. of Corrections, Admin. Reg. 740.02, § 1.6.1 (Jan. 5, 2004); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(2)(a) and (3)(a)

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state corrections policies permit five working days to appeal.[13]

The PLRA applies not only to state corrections agencies, but also to local jails and detention centers. As a practical matter, the smaller and more local the facility, the more difficult it is to obtain a copy of its grievance policy. However, we have included in our chart two county sheriffs' policies covering jails, and the deadlines in these policies are also quite short. The policy in the Glenn County (California) Jail provides five working days for the formal grievance and five working days for the appeal.[14] The Clark County (Washington) Sheriff's Office permits seven calendar days for the grievance and forty-eight hours for the appeal.[15]

Case law to date concludes that PLRA exhaustion requirements apply to juvenile facilities,[16] which sometimes

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(May 5, 2005); South Carolina Dept. of Corrections, Policy No. GA-01.12(13.5) (Nov. 1, 2004); Tennessee Dept. of Corrections, Index No. 501.01 VI (C)(2) and (3) (May 1, 2004); Virginia Dept. of Corrections, Proc. No. DOP 866-7.16(5) (Nov. 20, 1998).

[13] *See* Arkansas Dept. of Correction, Admin. Dir. 04-01 IV (G) (Feb. 1, 2004); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 VI (D)(2) (June 1, 2004); Michigan Dept. of Corrections, No. 03.02.130 (DD) (Dec. 19, 2003); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(K) (Jan. 15, 1992); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.04(B) (July 1, 2003); and West Virginia Division of Corrections, W. Va. Code St. R. § 90-9-3 (2005).

[14] *See* Glenn County Jail Handbook, *available at* http://www.countyofglenn.net/Jail (last visited Jan. 24, 2006).

[15] *See* Clark County Sheriff's Office, Inmate Handbook, *available at* http://www.co.clark.wa.us/sheriff/custody/handbook.pdf (last visited Jan. 24, 2006).

[16] *See Alexander S. v. Boyd*, 113 F.3d 1373, 1385 (4th Cir. 1997), *abrogated on other grounds, Martin v. Hadix*, 527 U.S. 343 (1999);

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provide as few as one to two days for filing grievances. *See, e.g.*, North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 (providing that grievances must be appealed to Facility Director within twenty-four hours); *Minix v. Pazera*, 2005 WL 1799538 at *3-4 (N.D. Ind. July 27, 2005) (discussing two-business-day deadline in Indiana juvenile facility).

B. A procedural default rule would discourage reporting of institutional problems, would eliminate remedies for meritorious claims, and would be difficult to administer.

A number of states have filed an amicus brief arguing that grievance deadlines are "essential to the operation of prison grievance procedures" because they "facilitate prompt investigation and resolution of grievances, allow for swift remedial responses, and ensure that prison officials receive timely information about prisoner complaints before inmate dissatisfaction leads to unrest." N.Y. Br. at 3. While prompt complaints are preferable, there are reasons why an inmate might legitimately delay filing a grievance: fear of retaliation, injury, or, particularly in the case of sexual assault victims, trauma or embarrassment. A procedural default rule would discourage inmates from filing complaints if the deadline has passed. By contrast, a simple exhaustion rule encourages inmates to report problems, and allows prison officials to determine whether they will seek to remedy them, or decline to do so on the

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Minix v. Pazera, 2005 WL 1799538 (N.D. Ind. July 27, 2005); *Moore v. Louisiana Dept. of Public Safety and Corrections*, 2002 WL 1791996 (E.D. La. Aug. 5, 2002); *Doe v. Cook County Juvenile Detention Center*, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999).

grounds that the information is too stale. The statutes of limitations on civil rights actions ensure that federal officials will not be haled into court to answer ancient claims. *See Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (concluding that § 1983 actions must be brought within state statutes of limitations for tort actions based on personal injuries).

In some situations, it would defy belief that prison officials would not want to learn about serious problems – for example a beating or sexual assault – even if it were brought to their attention after the deadline for filing a grievance. Indeed, this is another way in which prison grievance deadlines differ from state court procedural rules. State court rules and the habeas doctrine of procedural default are designed to ensure finality and to end second-guessing of state court judgments; they are essentially retrospective. *See Coleman v. Thompson*, 501 U.S. 722, 747 (1991). By contrast, prison grievance procedures, at least in part, function as a management tool: they bring issues to the attention of prison officials who are responsible for remedying constitutional violations on an on-going basis. *See* N.Y. Br. at 1, 3; *Porter*, 534 U.S. at 525. A procedural default rule would change the nature of prison grievance systems, transforming their deadlines into "safe harbor" provisions for rights abusers, and reducing the incentive for prison officials to remedy rights violations after the passage of the grievance deadline.

Maintaining a simple exhaustion rule does not mean, as the government claims, that inmates will be allowed to let prison grievance deadlines lapse and proceed directly to federal court. *See* Pet. Br. at 15; N.Y. Br. at 10. A mechanism already exists to force exhaustion: dismissal without prejudice. A court confronted with a prisoner's unexhausted claim

should dismiss it, to allow the prisoner to attempt to exhaust his tardy claim before returning to federal court. *See, e.g., Lawrence v. Goord*, 304 F.3d 198, 199-200 (2d Cir. 2002) (reinstating judgment of district court dismissing inmate's claim without prejudice to refiling after exhaustion). If the grievance deadline for a dismissed claim has passed, prison and jail authorities have a choice: they may choose to avail themselves of the opportunity to address the prisoner's claim and potentially forestall litigation. Alternatively, officials can choose to enforce their filing deadline, and, after the prisoner attempts to exhaust, he can return to federal court, having satisfied the purposes of the exhaustion requirement, to provide "time and opportunity . . . to address complaints internally" before suit, *Porter*, 534 U.S. at 525.

The government has framed the question presented in this case as encompassing not only alleged procedural defaults based on late complaints, but also other types of procedural defects. This raises the specter of requiring *pro se* inmates to file what is in effect a draft § 1983 complaint, with no opportunity to correct mistakes that they learn of later, within only a few days or weeks of an incident – an event that may have left the inmate physically injured or incapacitated, fearful of retaliation, or confined to a segregation unit with even less access to legal advice and information than is usually available in the institution. *See, e.g., Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) ("[G]rievances must contain the sort of information that the administrative system requires. Some states (Illinois is an example) require fact-pleading in litigation, and these might be expected to require factual detail in administrative grievances too.").

A procedural default rule based on grievance policies also would be difficult to administer because prison and jail grievance policies are much more malleable and informal than the state court rules of criminal procedure that are scrutinized in the habeas procedural default cases. *Cf. Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) (Georgia Supreme Court's retroactive application of a rule that barred consideration of a *Batson* claim did not constitute "firmly established and regularly followed state practice" that could constitute adequate and independent state ground for decision); *James v. Kentucky*, 466 U.S. 341, 346-49 (1984) (Kentucky's distinction between "admonitions" and "instructions" was not "the sort of firmly established and regularly followed state practice that can prevent implementation of federal constitutional rights"). Grievance policies are not always published, and sometimes must be requested directly from the defendants. Nor is there as well-developed a body of decisional law interpreting prison grievance systems as there is construing state rules of criminal procedure. *See Lee v. Kemna*, 534 U.S. 362, 387 (2002) (declining to apply procedural default rule when no published Missouri decision directed "unmodified application" of state rules governing requests for continuances). As a result, a procedural default rule would be difficult to apply, and would hand correctional officials the power to terminate civil rights challenges.

C. The most vulnerable inmates will be least able to comply with procedural deadlines and rules.

The most vulnerable inmates would be the most affected by a strict procedural default rule. Unlike judicial review of an agency determination, or federal habeas review of a

state court criminal conviction, the genesis of a civil rights action is a constitutional violation, not a prior legal proceeding. A prisoner who has been abused may fear or mistrust prison authorities, or simply believe that a grievance will not help. In the days or weeks after a serious incident, a prisoner may be injured, withdrawn, or frightened.

Some of the inmates subject to the PLRA are children.[17] In *Minix v. Pazera*, 2005 WL 1799538 (N.D. Ind. July 27, 2005), a district court in the Northern District of Indiana granted summary judgment to the defendants in a civil rights case brought by a young man, S.Z., and his mother, Cathy Minix, for injuries that he suffered while in custody at Indiana juvenile facilities, including South Bend Juvenile Facility.[18] *Id.* at *7. The *Minix* court based its decision on S.Z.'s failure to properly exhaust Indiana grievance procedures, which allow only two business days in which to file a grievance. *Id.* at *3.

While S.Z. was incarcerated in Indiana state juvenile facilities in 2002 and 2003, he was "jumped and beaten" repeatedly by other inmates, sustaining injuries including bruising, a black eye, a bloody nose, and a split lip. *Id.* at *1-2. No staff took action to investigate or protect him. *Id.* at *1. During one of these beatings, S.Z. suffered a "seizure-like" reaction; although staff were called to help him,

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[17] Courts have applied the PLRA exhaustion requirement to juvenile facilities. *See supra*, n.16.

[18] The *Minix* court granted defendants' motion for partial summary judgment, dismissed the federal claims without prejudice, and remanded the case to St. Joseph Superior Court "where an Indiana court may address claims brought under Indiana law against Indiana employees." *Id.* at *7.

no efforts were made to protect him, and he was beaten again the next day. *Id.* One of these beatings occurred in a day room which was monitored by four cameras. *Id.* at *2. At one point in his incarceration, S.Z. was raped, and he also saw another detainee being raped. *Id.* Presumably affected by these events, S.Z. was placed on suicide watch and sometimes did not eat. *Id.* at *1. In January 2003, S.Z. was beaten with padlock-laden socks. *Id.* at *2. This time, the staff gave him medical care and took pictures of his injuries. *Id.* Because he did not want to be viewed as a "snitch," S.Z. did not report these beatings. *Id.* Staff at the facility allegedly encouraged such beatings and arranged for juveniles to fight, sometimes even handcuffing a juvenile so that others could beat him. *Id.*

S.Z.'s mother, however, was aware of his injuries and made what the district court describes as "heroic efforts" to protect her son. *Id.* at *2, 7. Before S.Z. was beaten with padlocks, his mother told staff at the facility about the bruises on his body and the threats that had been made against him. *Id.* at *2. After the padlock beating, she wrote to an Indiana state Magistrate Judge and a Juvenile Judge, one of whom notified the Governor about her concerns. *Id.* In March 2003, Mrs. Minix attempted to attend a prearranged meeting with the Superintendent of one of the facilities, but was prevented from doing so by staff. *Id.* at *2, 4. She was never given any information about filing a grievance. *Id.* at *2. She contacted the Deputy Department of Correction (DOC) Commissioner, and, ultimately, the Governor. *Id.* at *4. Finally, in May 2003, S.Z. was "unexpectedly released on order from the Governor's office." *Id.* at *2.

Despite Mrs. Minix's repeated attempts to notify state authorities of the abuse of her son, the district court

concluded in a written opinion dated July 27, 2005, that S.Z.'s failure to comply with the Indiana grievance process, which includes a two-business-day deadline, meant that S.Z. could not proceed with his federal claims. *Id.* at *2-7. The court said that Mrs. Minix's attempts to alert state officials to the abuse of her son were insufficient, in part because they "did not issue within anything near the prescribed time." *Id.* at *4. The court wrote, "her communications didn't comply with the general time constraints built into the grievance process, which allow investigation and corrective action while evidence and memories are still available." *Id.*

In September 2005, less than two months after the district court's decision in S.Z.'s case, the Civil Rights Division of the Department of Justice (DOJ) reported the results of an investigation that it had conducted into juvenile facilities in Indiana, including the South Bend Juvenile Correctional Facility, one of the facilities where S.Z. was assaulted. The DOJ concluded that, "certain deficiencies at South Bend violate the constitutional and federal statutory rights of the youth residents," and that "South Bend fails to adequately protect the juveniles in its care from harm."[19] It also concluded that, "[th]e dysfunctional grievance system at South Bend contributes to the State's failure to ensure a reasonably safe environment."[20]

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[19] Letter of Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, now Governor of the State of Indiana 2, 3 (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (last visited Jan. 24, 2006).

[20] *Id.* at 7.

Minix illustrates the situation that will confront juveniles under a strict procedural default regime. Children subject to unconstitutional abuse will not be able to seek protection or redress in federal court because of their inability to challenge their abusers within the few days or weeks allowed by the grievance system. Although an executive agency ultimately investigated the facility at issue in *Minix*, the individual plaintiff in that case did not get relief in a timely fashion. Moreover, the DOJ does not possess sufficient resources to investigate every facility where constitutional abuses are alleged.

Many adult inmates also will have trouble complying with short grievance deadlines. One of the greatest obstacles to compliance is illiteracy or poor literacy. Not surprisingly, incarcerated people report lower levels of educational attainment than the general population: forty percent of state prison inmates, twenty-seven percent of federal inmates, and forty-seven percent of inmates in local jails have failed to complete high school or its equivalent, compared with only about eighteen percent of the general population. CAROLINE WOLF HARLOW, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, EDUCATION AND CORRECTIONAL POPULATIONS 2 (Jan. 2003). The National Adult Literacy Survey (NALS), conducted in 1992 by the United States Department of Education, concluded that the vast majority of inmates – seven out of ten – operate at the lowest two levels of literacy on a five-level scale. U.S. DEPT. OF EDUCATION OFFICE OF EDUCATION AND RESEARCH, LITERACY BEHIND PRISON WALLS: PROFILES OF THE ADULT PRISON POPULATION FROM THE NATIONAL ADULT LITERACY SURVEY xviii (1994). Some inmates performing at the lowest level "do not demonstrate the ability to perform even . . . fairly straightforward literacy tasks," such as

finding a single fact in a short piece of text or entering personal information on a form. *Id.* at 17. A procedural default rule will sweep many of these persons out of court for failing to conform to procedures they are incapable of understanding and following correctly.

Further, a significant percentage of inmates suffer from mental illness: Bureau of Justice Statistics (BJS) surveys report that sixteen percent of state prison inmates, seven percent of federal inmates, and sixteen percent of those in local jails "reported either a mental condition or an overnight stay in a mental hospital." PAULA M. DITTON, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999). Some estimates are even higher. *See* AMERICAN PSYCHIATRIC ASSOCIATION, PSYCHIATRIC SERVICES IN JAILS AND PRISONS xix (2d ed. 2000) (estimating that about twenty percent of inmates in prisons and jails have serious mental illnesses and that up to five percent are actively psychotic). Another BJS report states that one in ten inmates takes psychotropic medications, with the figure increasing to nearly one in five in certain states. ALLEN J. BECK AND LAURA M. MARUSCHAK, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS 1, 4 (2001). By the time a family member or advocate discovers that a mentally ill person has been abused, it may be too late to file a grievance.

Most likely a prisoner in this situation will not have ready access to legal advice. Few indigent inmates have lawyers on retainer to advise them in civil matters,[21] and

[21] Particularly in the wake of the PLRA fee caps, 42 U.S.C. § 1997e(d) (2005), and restrictions on Legal Services Corporation (LSC) funding, Omnibus Consolidated Rescissions and Appropriations Act of

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their access to legal advice and information in prison within the stringent time limits of prison grievance procedures generally will be limited.[22] This is especially true for prisoners seeking to challenge abusive conduct by jail or prison staff, because such inmates may be injured, intimidated or fearful, or confined to a segregation unit. Thus, even if a prisoner has a meritorious claim – even if a court will later appoint counsel for the prisoner – the prisoner may not be represented during the time for filing a grievance.

II. EXHAUSTION UNDER CRIPA AS AMENDED BY THE PLRA CANNOT BE ANALOGIZED TO HABEAS EXHAUSTION OR ADMINISTRATIVE APPEALS.

A. This Court should not engraft a habeas-style procedural default rule onto the civil rights statutes.

Petitioner argues that, "[b]ecause the policy considerations underlying federal-habeas exhaustion are analogous to those underlying PLRA exhaustion, both the rationale for and utility of a procedural-default mechanism in federal habeas apply under the PLRA." Pet. Br. at 12. In

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1996, Pub. L. No. 104-134, § 504 (a)(15), 110 Stat. 1321, 1355 (1996), many jurisdictions have few law offices and legal services organizations willing and able to take inmates' cases, let alone ones that are well-versed in how to develop them.

[22] Even if the prisoner has a civil rights attorney, he may be required to navigate the prison grievance proceeding *pro se*; many grievance proceedings do not allow lawyers to file grievances on behalf of their clients. *See, e.g.*, United States Bureau of Prisons, Directive 1330.13, § 540.16 (Aug. 13, 2002) (noting that, although an inmate may obtain assistance from outside sources, including attorneys, "no person may submit a Request or Appeal on the inmate's behalf," and seeking outside assistance will not justify a filing delay).

fact, the federal-state comity issues in habeas corpus and prisoners' civil rights claims are quite different. Law professors have submitted an amicus brief in support of Respondent explaining that the habeas procedural default rule is a creature of the adequate and independent state ground doctrine, designed to force the primary litigation of criminal defendants' constitutional claims in state courts. Brief of Law Professors as Amicus Curiae in Support of Respondent, *Woodford v. Ngo* (No. 05-416).

As this Court has said, habeas procedural default rules are designed to make "the state trial on the merits the 'main event' . . . rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977). This Court has extended the concept of "procedural default" in the habeas context to later stages of the state court criminal process, including direct appeal and state post-conviction proceedings, thereby ensuring the primacy of the entire state court criminal system. *See, e.g., Edwards v. Carpenter*, 529 U.S. 446, 452-54 (2000).[23] Indeed, after the Anti-Terrorism and Effective Death Penalty Act (AEDPA), federal habeas courts are required to accord considerable deference to state courts' determination of federal constitutional claims, granting relief only if the state-court adjudication was "contrary to, or an unreasonable application of, clearly established Federal law, as

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[23] Petitioner cites language from *Edwards* in support of the notion that exhaustion and procedural default are not analytically distinct. Pet. Br. at 27-28. The *Edwards* Court's reference to the "inseparability of the exhaustion rule and the procedural-default doctrine," however, only describes the importance of procedural default in the habeas context; it does not conflate the two concepts. 529 U.S. 446, 452-53.

determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (2005).

These comity concerns are simply inapplicable to civil rights suits under § 1983. The civil rights and habeas statutes strike a different balance between federal and state authority. 42 U.S.C. § 1983 was enacted specifically to enable federal courts to vindicate federal civil rights when state and local officials were unable or unwilling to do so. Describing the debates preceding passage of § 1983 in 1871, this Court wrote in *Monroe v. Pape*: "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies." 365 U.S. at 180.

Moreover, prison and jail grievance systems are in no way the "main event" in civil rights litigation in the sense that state court criminal proceedings, with their constitutionally mandated protections, are the focus of federal post-conviction litigation. Grievance proceedings primarily serve a correctional management, not a "rights-protection" purpose. Inmate grievance proceedings are not conducted by judges, and they are not accompanied by significant procedural protections. Often, no evidence is taken, and no legal argument considered. Indeed, amicus is aware of no situation in recent years in which a prison system has afforded an LSO clinic client even an administrative hearing in response to a grievance. No one would argue, for example, that a federal court should defer to a prison grievance officer's determination of federal law. When a federal court hears a § 1983 action, it does not deferentially review

the prison grievance proceeding; it hears the claim *de novo*, perhaps after a full trial, with such evidentiary illumination as the administrative record may provide.

The government cites *Preiser v. Rodriguez*, 411 U.S. 475 (1973), for the proposition that the same comity concerns that underlie habeas rules also restrain federal courts' review of state prison officials' actions in a civil rights case. U.S. Br. at 15; *see* Pet. Br. at 29. The actual holding of *Preiser* is that actions implicating good time credits challenge custody, "the core of habeas corpus," and thus must be brought in habeas so that they are subject to state court exhaustion. *Preiser*, 411 U.S. at 491-92. Since *Preiser*, this Court has reaffirmed repeatedly that the comity concerns underlying its holding apply only where the fact or duration of custody is at issue, and that habeas exhaustion principles extend no further than those cases. *See Wilkinson v. Dotson*, 125 S. Ct. 1242, 1247-48 (2005); *Muhammad v. Close*, 540 U.S. 749, 754-55 (2004).

Petitioner also attempts to equate the deference that federal courts accord prison officials in matters of prison administration under *Turner v. Safley*, 482 U.S. 78 (1987), with the federal-state comity concerns underlying habeas procedural default rules. Pet. Br. at 29-30. However, the *Turner* standard does not require federal courts to defer to prison rules limiting courts' ability to hear constitutional claims. *Turner* recognizes that "courts must take cognizance of the valid constitutional claims of prison inmates," and that, "when a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* at 84. *See, e.g., Hope v. Pelzer*, 536 U.S. 730 (2002). Indeed, with respect to certain types of constitutional claims, federal courts will abandon *Turner* deference for strict

scrutiny. *Johnson v. California*, 125 S. Ct. 1141, 1147-49 (2005). In the absence of a clear Congressional mandate, this Court cannot allow prison and jail officials' procedural rules to limit federal courts' ability to discharge their duty.

B. A civil rights action under Section 1983 is not analogous to judicial review of federal agency decisions.

The United States argues that procedural default is required by a "general rule of administrative procedure." U.S. Br. at 10. In support of this argument, however, the government relies on cases involving federal judicial review of federal agencies' decisions, which stand for the proposition that courts should not consider arguments that were not first presented to the agency. *Id.* at 10-11. This principle cannot be transplanted to prison and jail grievance procedures preceding the filing of a civil rights action.

Exhaustion under CRIPA as amended by the PLRA is in no way analogous to the scheme of federal administrative law, which involves a unified system of statutes, regulations, and agency procedures, with the overall purpose of ensuring that agency procedure is implemented correctly and consistently. In civil rights actions, federal courts do not "review" the decisions reached in prison grievance proceedings in the way that they review the decisions of administrative law judges and agencies. An action under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), is an original action in which discovery may be conducted and evidence taken; it is not limited by the administrative record of the prison grievance proceeding. *See Garcia v. Village of Mount Prospect*, 360 F.3d 630, 643-44

(7th Cir. 2004) ("Title VII and §§ 1981 and 1983 claims are original actions independent of the administrative review proceeding and are therefore plenary in scope.").

Certainly, the government could not argue that a federal district court should defer to a prison or jail grievance system's interpretation of a statute governing correctional officers' behavior. *Contrast Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-45 (1984). Nor would a federal district court defer to a prison grievance officer's findings of fact regarding an inmate's constitutional claim of excessive force or inadequate medical care. *Contrast Dickinson v. Zurko*, 527 U.S. 150, 160-63 (1999) (discussing the appropriate standard of review for courts to apply to findings of fact made by the Patent and Trademark Office).

As this Court has recognized, the administrative procedures accorded inmates by their jailers often include "few of the procedural safeguards contained in the Administrative Procedure Act [APA]." *Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (recognizing that disciplinary proceedings provided no right to a lawyer, compulsory process, confrontation of witnesses, or discovery, among other safeguards). In the experience of amicus, exhaustion of grievance procedures – even in the federal system – often consists of little more than a prisoner filling out a form, which is sometimes returned with a response written at the bottom. The Indiana grievance policy reviewed by amicus states candidly that, "[t]he grievance policy is not a legal forum." *See* Indiana Department of Correction, Policy No. 00-02-301 XIV (May 1, 2000). In fact, some states specifically exempt correctional agencies from their state administrative procedure acts. *See, e.g.*, Utah Code Ann. § 63-46b-1(2)(c) (2005); Texas Code Ann. § 2001.226 (2005).

This case will in large part determine the continued viability of § 1983 and other civil rights statutes as vehicles for federal courts to review the treatment of inmates. This Court should not accede to the government's request that it engraft a judicially-imposed procedural default rule onto the civil rights statutes, but should instead require what Congress intended and policy considerations mandate – simple exhaustion.

CONCLUSION

For all of the foregoing reasons, amicus Jerome N. Frank Legal Services Organization (LSO) urges this Court to affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
United States Bureau of Prisons	Directive 1330.13 Effective 8/13/02	Yes	20 days	20 days	30 days	N/A
Alabama[2]						
Alaska Department of Corrections	Index No. 808.03 Effective 5/23/02	Yes	30 days	2 days*	30 days	N/A
Arizona Department of Corrections	Department Order 800 Effective 3/3/00	Yes 10 days*	10 days†	10 days	10 days	N/A
Arkansas Department of Corrections	Admin. Directive 04-01 Effective 2/1/04	Yes 15 days	3 days*†	5 days*	N/A	N/A
California Department of Corrections	Title 15 California Code of Regulations §§ 3084.2(b), 3084.5, 3084.6(c) (2004)	Yes	15 days*[3]	15 days*	15 days*	N/A
Glenn County, California Division of the Sheriff	Glenn County Jail Handbook § II	No	5 days*[4]	5 days*	N/A	N/A
Colorado Department of Corrections	Regulation No. 850-04 Effective 12/15/05	No‡	30 days	5 days	5 days	N/A
Connecticut Department of Correction[5]	Admin. Directive 9.6 Effective 3/5/03	Yes	30 days[6]	5 days	5 days[7]	N/A
Delaware Bureau of Prisons	Procedure No. 4.4 Revised 5/15/98	Yes[8] 7 days	Automatic[9]	3 days[10]	N/A	N/A
District of Columbia Department of Corrections	D.O. 4030.1D Effective 5/4/92	Yes	15 days	5 days	5 days	N/A
Florida Dept. of Corrections	Chapter 33-103 of the Rules of the Dept. of Corrections Effective 10/9/05	Yes[11]	15 days*†[12]	15 days	N/A	N/A

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* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
Georgia Department of Corrections	Standard Operating Procedures Ref. No. IIB05-0001 Effective 6/1/04	Yes 10 days	5 days*†	5 days*	N/A	N/A
Hawaii Department of Public Safety	Policy No. 493.12.03 Effective 4/3/92	Yes	14 days	5 days	5 days	N/A
Idaho Department of Correction	Directive No. 316.02.01.001 Revised 9/16/04	Yes	15 days	10 days	N/A	N/A
Illinois Department of Corrections	20 Ill. Admin. Code §§ 504.810, 504.850	Yes	60 days	30 days	N/A	N/A
Indiana Department of Correction	Admin. Procedure No. 00-02-301 Effective 5/1/00	Yes 48 hours	2 days*†	2 days*	2 days*	2 days*
Iowa Department of Corrections	Policy No. IN-V-46 Revised January 2005	Yes	30 days	15 days	15 days	N/A
Kansas Department of Corrections	44-15-101 14-15-102	Yes	15 days*[13]	3 days	N/A	N/A
Kentucky Department of Corrections	Policy No. 14.6 Effective 1/4/05	No[14]	5 days*	3 days*	3 days*	N/A
Louisiana Department of Public Safety and Corrections	La. Admin. Code, tit 22, pt. I, § 325	No‡	90 days[15]	5 days	N/A	N/A
Maine Department of Corrections	Policy and Procedures Manual Subsection 29.1	Yes	15 days	10 days	10 days	N/A
Maryland Department of Public Safety and Correctional Services	Directive No. 185-001 Effective 2/1/01 Code of Maryland Regulations 12.07.01.01 *et seq.*	No‡	15 days	10 days	30 days[16]	N/A
Maryland Department of Public Safety and Correctional Services, Division of Pretrial Detention and Services[17]	Directive No. 180-1 Issued 11/30/00	No	30 days	Not specified[18]	3 days*	3 days*

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Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
Massachusetts Department of Correction	103 CMR 491.00 Effective 1/5/01	No‡	10 days*	10 days*	Automatic[19]	N/A
UMass Correctional Health (UMCH) Massachusetts Department of Correction	Policy and Procedures Manual No. 12 Approved 4/5/04	No‡	10 days*	10 days*	Not specified[20]	N/A
Michigan Department of Corrections	Policy Directive No. 03.02.130 Effective 12/19/03	Yes 2 days*	5 days*†	5 days*	10 days*	N/A
Minnesota Department of Corrections	Policy No. 303.100 Effective 5/1/05	Yes	Not specified[21]	15 days*	N/A	N/A
Mississippi Department of Corrections	Inmate Handbook, Chapter VIII	No‡	30 days	Not specified[22]	Not specified	N/A
Missouri Department of Corrections	Institutional Services Policy and Procedure Manual Procedure No. IS8-2.1 Effective 1/15/92	Yes 15 days	5 days*†	5 days*	10 days*	N/A
Montana State Prison Policies and Procedures	Policy No. 3.3.3 Effective 4/1/97	Yes 5 days*	3 days*†	3 days*	3 days*	N/A
Nebraska Department of Correctional Services	No. 217.02 Effective 12/19/85 References tit. 68, ch. 2 Nebraska Admin. Code	Yes 3 days	15 days†[23]	10 days	N/A	N/A
Nevada Department of Corrections	Admin. Regulation 740 Effective 1/5/04	Yes[24] 6 months[25]	5 days†	5 days	N/A	N/A
New Hampshire Department of Corrections	Statement No. 1.16 Effective 10/01/02	Yes 30 days	30 days†	30 days	N/A	N/A
New Jersey Department of Corrections	Internal Management Procedure IMM.RRP.003 IMM.002.001 Revised 8/1/03	No‡	Not specified	10 days*	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

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‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
New Mexico Corrections Department	CD-150500 and 150501 Revised 6/22/05	Yes 5 days	20 days[26]	7 days	N/A	N/A
New York Department of Correctional Services	N.Y. Comp. Codes R. and Regs. Tit. 7, § 701.7 2005	No‡[27]	14 days	4 days*	4 days*	N/A
City of New York Department of Correction	Directive No. 3375R Effective 3/4/85	Not specified[28]	Not specified	Not specified[29]	Not specified	Not specified
North Carolina Department of Correction	Rules and Policies Inmate Booklet March 2002	Yes	1 year	Not specified[30]	Not specified	N/A
North Carolina Department of Juvenile Justice and Delinquency Prevention	Policy No. YD/DC 8.0 Effective 11/19/04	Yes	24 hours[31]	24 hours	24 hours	N/A
North Dakota Department of Corrections	Policies and Procedures Manual Revised 5/5/05	Yes 5 days	15 days	5 days[32]	5 days	N/A
Ohio Department of Corrections	Ohio Admin. Code § 5120-9-31	Yes 14 days	14 days†	14 days	N/A	N/A
Oklahoma Department of Corrections	OP-090124 Effective 10/11/05	Yes 3 days[33]	15 days[34]	15 days[35]	N/A	N/A
Oregon Department of Corrections	291-109-0100 *et seq.*	Yes[36]	30 days	14 days	14 days	N/A
Pennsylvania Department of Corrections	Policy No. DC-ADM 804 Effective 1/3/05	No‡	15 days*	10 days*	15 days*	N/A
Rhode Island Department of Corrections	R.I. Code R. 06 070 002 Effective 1/7/80	No	3 days	3 days*	3 days*	3 days*
South Carolina Department of Corrections	GA-01.12 Issued 11/1/04	Yes	15 days	5 days	30 days[37]	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

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‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

Agency or Jurisdiction	Policy or Other Source[1]	Informal Resolution Required?	Time for Filing First Official Grievance	First Appeal	Second Appeal	Third Appeal
South Dakota Department of Corrections	Admin. Remedy for Inmates Policy No. 1.3.E.2 8/22/05	Yes 30 days	5*†	10 days[38]	N/A	N/A
Tennessee Department of Corrections	Index No. 501.01 Effective 5/1/04	No	7 days[39]	5 days	5 days	N/A
Texas Department of Criminal Justice	Offender Orientation Handbook November 2004	Yes	15 days	15 days	N/A	N/A
Utah Department of Corrections	Institutional Operations Division Manual Revised 7/1/03	Yes 7 days*[40]	5 days*†	5 days*	N/A	N/A
Vermont Department of Corrections	Directive 320.01 320.01.01, 320.01.02 Effective 9/1/00	No[41]	Not specified	Not specified	N/A	N/A
Virginia Department of Corrections	Procedure No. DOP 866 Effective 11/20/98	Yes	30 days	5 days	5 days	N/A
Washington Department of Corrections	No. DOC 550.100 Effective 3/1/05	Yes	Not specified	Not specified[42]	Not specified	N/A
Clark County Sheriff's Office, Washington	Inmate Handbook	Yes	7 days	48 hours	48 hours	N/A
West Virginia Division of Corrections	W. Va. Code of State Rules § 90-9-3	No	15 days	5 days*	5 days*	N/A
Wisconsin Department of Corrections	Wisconsin Admin. Code § DOC 310.09 *et seq.*	No‡[43]	14 days	10 days	N/A	N/A
Wyoming Department of Corrections	Admin. Reg. No. 2.501 Revised 12/11/98	Yes 7 days	30 days	10 days	N/A	N/A

* indicates working or business days. Otherwise, "days" are calendar days.

† indicates that first formal grievance deadline is measured from the response to an informal resolution attempt. Otherwise, days for filing the first official grievance are counted from the day of the incident.

‡ indicates that informal resolution is encouraged or preferred, but not mandated.

All appeal deadlines generally run from the date of the response at the preceding grievance level.

[1] Because prison and jail grievance policies sometimes are not published in a readily available form, and because in some jurisdictions they may be revised frequently, these policies should be considered illustrative only. Amicus does not represent that these policies are the most current. The policies and materials that we relied on in compiling the chart are available on the LSO web site at www.law.yale.edu/Woodford.

[2] According to the Alabama Department of Corrections (DOC), the Alabama DOC grievance procedure is currently under review. *See* www.doc.state.al.us/adminregs.asp, last checked 1/24/06.

[3] The policy states, "[a]n appellant must submit the appeal within 15 working days of the event or decision being appealed, or of receiving an unacceptable lower level appeal decision." Calif. Code of Regs., tit. 15, § 3804.6(c) (2004).

[4] The Inmate Handbook states that grievances may be resolved at 5 levels – Food Manager, Correctional Officer, Correctional Corporal, Jail Division Command, and Under-Sheriff. The Under-Sheriff level is also characterized as an appeal. Glenn County Jail Handbook at 15-16, available at www.countyofglenn.net/Jail, last checked 1/24/06.

[5] The Connecticut Department of Correction policy applies both to jails and to prisons in Connecticut.

[6] An exception is provided for grievances regarding property, which must be filed within one year of discovery or three years of the occurrence. Connecticut Dept. of Correction Admin. Dir. 9.6(10)(G).

[7] Level 3 review is restricted to grievances which: 1) challenge department level policy; 2) are emergency and cannot be acted upon at subordinate level; 3) challenge integrity of the grievance process; or 4) did not receive a timely Level 2 response. Connecticut Dept. of Correction Admin. Dir. 9.6(17).

[8] The "Informal Resolution" stage of the process is also described as Level I of the process and requires the filing of a form within 7 calendar days of the incident. Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[9] Grievances that are not resolved informally are automatically referred to the Resident Grievance Committee, which makes a recommendation to the Warden ("Level II"). Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[10] The Warden's decision may be appealed to the Bureau's Grievance Officer ("Level III"). Delaware Bureau of Prisons Procedure No. 4.4, IGP Resolution Levels, revised 5/15/98.

[11] Informal resolution must be attempted within a "reasonable time." Rules of the Florida Dept. of Corrections, Ch. 33-103.011(1)(a), effective 10/9/05.

[12] Policy states that, "the specified time frame shall commence on the day following the date of the incident or response to the grievance at the previous level." Rules of the Florida Dept. of Corrections, Ch. 33-103.011, effective 10/9/05.

[13] Policy states that, "grievances shall be filed within 15 days from the date of the discovery of the event giving rise to the grievance, excluding Saturdays, Sundays, and holidays." Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates § 44-15-101b. The first step of the grievance process is that the inmate must seek informal, documented resolution through unit team. If no response within 10 days, may file grievance report directly with the warden; if unsatisfactory response to informal resolution, must file grievance within 3 calendar days of response to informal resolution request. Kansas Dept. of Corrections, Article 15 – Grievance Procedure for Inmates, § 44-15-102(a)(2) and (b).

[14] Informal resolution shall be attempted by staff after grievance is filed. If grievant is not satisfied with informal resolution, he must make a written request to Grievance Committee within 5 days of notice. Kentucky Dept. of Corrections, Policy No. 14.6II (J)(1)(b)(1) and (8), effective January 4, 2005.

[15] First letter to warden must be written within 90 days of the incident, but the policy also states that a grievance may be screened out if "initial request" is made more than 30 days from the event. Apparently, the policy was amended in September 2002 to lengthen the deadline for filing a grievance from 30 to 90 days; however, one provision states that a grievance may still be rejected if "there has been a time lapse of more than 30 days between the event and the initial request." *Compare* La. Admin. Code, tit. 22, pt. 1, § 325 (A)(2) and (G)(1)(A), amended LR 28:1993 (September 2002), *with* (F)(1)(a)(x).

[16] Appeal to Inmate Grievance Office. The Inmate Grievance Office may dismiss a grievance or refer for a hearing before an administrative law judge (ALJ). Code of Md. Regs. 12.07.01.07-08. The ALJ can either deny relief, or, if the ALJ determines that the prisoner's complaint is meritorious, submit a recommendation for relief to the Secretary. Code of Md. Regs. 12.07.01.10.

[17] This Maryland policy applies to pretrial detainees; the previous entry applies to sentenced prisoners.

[18] First appeal is to Inmate Grievance Procedure Committee, and deadline is not specified. Subsequent appeals to Warden and Commissioner must be made within 3 working days. Maryland Dept. of Public Safety and Correctional Services Division of Pretrial Detention and Services, Policy No. 180-1 V (B)(1), (C)(1), (D)(1), issued November 30, 2000.

[19] Appeal to Superintendent must be made in 10 working days. Central office reviews denials of relief by the Superintendent automatically. 103 CMR §§ 491.12(1) and 491.13.

[20] Appeal to UMCH Medical Director must be made in 10 business days. Timeframe for second appeal, to DOC Health Services Division, is not specified. Univ. of Massachusetts Correctional Health, Massachusetts Dept. of Correction, Policy & Procedures Manual, No. 12, Procedure 3(b) and 5(a), effective 4/5/04.

[21] Inmate must have at least 40 days until release to file a grievance. Minnesota Dept. of Corrections Policy No. 303.100, Procedures (A)(1), effective 5/1/05.

[22] Mississippi Department of Corrections Inmate Handbook refers to "Steps Two and Three" of the grievance procedure, but does not specify timelines. Mississippi Dept. of Corrections Inmate Handbook, Chapter VIII.

[32] First formal grievance must be filed within 15 calendar days of response to request for informal resolution, or, if no response is received, within 20 days of the incident. Nebraska Admin. Code, tit. 68, ch.2, § 004.02.

[34] This required first step is actually quite formal, requiring the inmate to submit a written "request slip," detailing his allegations; the complaint is not termed a "grievance," however, until it is filed with the Warden. New Hampshire Dept. of Corrections Policy and Procedure Directive No. 1.16 IV, reviewed 10/01/03.

[35] Informal resolution must be attempted within 6 months for personal property damage or loss, personal injury, medical claims, other tort claims, or civil rights claims. For all other issues, it must be attempted within 10 calendar days. Nevada Dept. of Corrections, Admin. Reg. 740, 1.4.1.1, effective 1/5/04.

[36] Policy states that formal grievance must be filed within 20 days of the date of the Inmate Informal Complaint. New Mexico Corrections Dept., CD-150-501 (A)(1), revised 6/22/05.

[37] Informal resolution is not a condition of filing a grievance, but policy states that an inmate's failure to attempt informal resolution may result in dismissal of grievance. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.3(a)(2005).

[38] Inmate files a grievance with committee. If it is not informally resolved, inmate may request a formal hearing. City of New York Dept. of Correction, Classification No. 3375R III (B)(1) and (2), effective 3/4/85.

[39] Three appeals – to Warden, Central Office Review Committee, and the Board of Correction/Commissioner – are available. However, policy specifies no deadlines. City of New York Dept. of Correction, Classification No. 3375R III (B)(3)-(5), effective 3/4/85.

[40] Two levels of appeal are provided – to Region Director/Institution Head and to Grievance Examiner/Secretary of Correction. However, Inmate Rules and Policies Booklet specifies no deadlines for these appeals. North Carolina Dept. of Corrections Rules and Policies § 20 (6) (March 2002)

[41] North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 does not specify a timeframe for the first official grievance to Human Services Coordinator. North Carolina Dept. of Juvenile Justice and Delinquency Prevention, Policy No. YD/DC 8.0, effective 11/19/04. However, the Nondisciplinary Grievance Report Form states, "If you have a complaint or grievance, fill out this form and give it to the human services coordinator within 24-hours of the incident."

[42] Policy states both "5 working days" and "5 days." *Compare* North Dakota Dept. of Corrections Inmate Grievance Procedure VI (I)(1)(g) with VI (I)(2)(a) and (3)(a), revised 5/5/05.

[43] Inmate must speak with staff within 3 days of incident. If complaint not resolved, inmate must submit "Request to Staff" within 7 calendar days of incident. Oklahoma Dept. of Corrections, OP-090124 IV (A) and (B), effective 10/11/05.

[44] Inmate must submit formal grievance within 15 calendar days of incident or date of the response to the "Request to Staff" form, whichever is later. Oklahoma Dept. of Corrections, OP-090124 V(A)(1), effective 10/11/05.

[45] Appeal allowed only if new evidence is uncovered or probable error. Oklahoma Dept. of Corrections, OP-090124 VII, effective 10/11/05.

[46] Inmate must attempt both verbal and written informal resolution. Oregon Admin. Rules 291-109-0140 (1)(a).

[47] First appeal is to Division Director of Operations. Some issues may then be appealed to. South Carolina Administrative Law Judge Division (ALJ). South Carolina Dept. of Corrections Policy No. GA-01.12 (13.4)-(13.6), issued 11/1/04.

[48] Warden's response may only be appealed to the Secretary of Corrections if complaint concerns a major disciplinary action – a classification action, or a decision regarding the restoration of good time credits. South Dakota Dept. of Corrections Admin. Remedy for Inmates, Policy No. 1.3.E.2, Appeals to the Secretary of Corrections (Aug. 22, 2005).

[49] There is an exception for Title VI complaints, which must be filed within 180 days of the occurrence of the alleged discriminatory act. Tennessee Dept. of Corrections, Admin. Policies & Procedures, Index No. 501.01 VI (C)(1), effective 5/1/04.

[50] "Level One" of the process is described as "Informal." Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A), revised 7/1/03. The Manual also requires inmates to document reasonable attempts to resolve complaints informally. *Id.* at FDr02/02.08(A)(1).

[51] Vermont Dept. of Corrections Procedure No. 320.01.01(4)(I), effective 9/1/00, states, "[s]taff at all levels will make every effort to resolve issues before they escalate to grievances. However, if the offender desires to formally grieve an issue, staff will provide the offender with grievance form #1."

[52] The policy refers to two levels of appeal, but no timelines are specified. Washington Dept. of Corrections, No. DOC 550.100 IV, effective 3/1/05.

[53] The policy states that prior to accepting a complaint, grievance officials may direct the inmate to attempt to resolve the issue. Wis. Admin. Code § 310.09 (4) (2005).